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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIE RODRIGUEZ, JR., Defendant and Appellant.	No. A154371 (San Francisco County Super. Ct. No. SCN 225901)

The trial court in effect instructed the jury both that it did and did not need to find defendant Willie Rodriguez, Jr. acted with a sexual motive to convict him of misdemeanor child molestation. The parties agree the court erred in giving these conflicting instructions but disagree about the error's impact on Rodriguez's case. We conclude the error was harmless because the evidence points to only one conclusion: Rodriguez committed the relevant act—exposing himself to the victim, Marie C., as she sat on her bed watching television—with a sexual motive.

Rodriguez raises two other issues. He asks that we review in camera Marie's sealed school records to determine if the trial court abused its discretion by withholding them. Having done so, we conclude the court did not abuse its discretion. He also argues the trial court improperly relied on Marie's age to sentence him to an upper term of eight years for his count III felony conviction, for committing a lewd act on a child, because the offense includes an age-range factor. Most of the court's statement of its reasons for imposing this upper term cited Marie's status as nine-year-old child alone, which was

error for the reason asserted by Rodriguez that requires a remand for further sentencing proceedings.

We therefore affirm, except that Rodriguez's upper-term sentence for committing a lewd act upon a child under the age of 14 in violation of Penal Code section 288, subdivision (a) is vacated and this matter is remanded to the trial court for further sentencing proceedings consistent with this opinion.

BACKGROUND

In a February 2018 first amended information, the San Francisco County District Attorney charged Rodriquez with one count of oral copulation or sexual penetration by an adult of a child under 10 years age (Pen. Code, § 288.7, subd. (b),[1] count I); four counts of felony committing a lewd act on a child under 14 years of age (§ 288, subd. (a), counts II through V), and two counts of misdemeanor child molestation (§ 647.6, subd. (a)(1), counts VI and VII). Defendant was found guilty after a jury trial of counts III and VI and acquitted of the remainder. We summarize the evidence regarding his two convictions only.

I.

Evidence Presented at Trial

A. The Prosecution's Evidence

Evidence presented at trial indicates that Rodriguez stayed with Marie and her mother, Lynn C., in San Francisco between January 2013 and sometime in 2014. Previously, Rodriguez and his family had taken in Lynn and her son, who were then homeless. After his wife died, Lynn took Rodriguez into her home (residence). Although he found an apartment through the Salvation Army, he continued to spend nights at the residence. He helped by taking Marie to school, cleaning, doing chores, helping to pay rent and buying electronics for Marie and her brother. Marie considered Rodriguez to be like a grandfather.

[1] All statutory references are to the Penal Code unless otherwise stated.

Regarding the incident upon which count VI was based, Marie testified that she and Rodriguez were in her bedroom watching television when he exposed his penis to her. This was the first time he had done anything inappropriate to her. Some time later, after Rodriguez had disciplined her, including kicking her, for going to a neighbor's for a sleepover without doing her chores, Marie became upset and told Lynn that Rodriguez had "showed his private" to her. Marie testified that Lynn kicked Rodriguez out of the residence. However, Marie continued, a couple of weeks later she told Lynn that she had lied about Rodriguez exposing himself because she was scared he would hurt Lynn. Rodriguez moved back into the residence the next day.

Regarding the subsequent incident upon which count III was based, Marie testified that while she and Rodriguez were in the bathroom at the residence, Rodriguez masturbated himself while touching Marie's breast. Rodriguez ejaculated and asked Marie if she wanted to taste the semen. He told her "it tasted sweet, like milk." Some time later, after Rodriguez had threatened to "yank [her] out of bed by [her] hair if [she] didn't get up for school," she told her mother that Rodriguez had exposed himself to her. She acknowledged at trial that she told her mother about this and the other incident because Rodriguez was being strict with her and she wanted him out of the house.

Rodriguez moved out again. Lynn also called the police in May 2014. About a week and a half later, Marie participated in a forensic interview. Regarding what was to become the count VI charge, Marie said that a year earlier, when she was nine years old, she was sitting on her bed watching television when Rodriguez walked in, asked her if he could show her something and pulled out his "private." She could not remember what he did with it. Regarding what was to become the count III charge, Marie said that when she was in a bathroom at the residence, Rodriguez exposed his penis to her, touched her breast, masturbated, ejaculated, said she could drink his sperm and told her in his "scary voice" not to tell anyone what he had done.

After this interview, a police officer and Marie conducted a pretext phone call with Rodriguez that was recorded and played for the jury. When Marie asked Rodriguez why he had shown his private to her, he replied, "I already forgot about all that. I don't

even—I don't even think about it. I don't even, you know. I don't even go there."[2] When Marie asked again why he had done it, Rodriguez said she had "instigated a lot of it." Asked how, he said, "You were only 6 or 7 you know and I don't know how it all began or why it began and all that. When I told you that I told you don't let that ever happen inside your body by anybody so you won't get pregnant, okay? If you remember that, I told you that." He said, "I blame myself wholeheartedly one hundred percent . . . but you're the one that instigated the beginning of it . . . ." He said she tried to look up his shorts and hid under the bathroom sink and in his bedroom closet to watch him undress. Marie asked, "Why'd you do those other things" and Rodriguez replied, "[T]hat's what you wanted at the time" and "What you did is your actions were talking for yourself kiddo." He said he once was sitting on the couch in the front room when Marie came in wearing a towel, opened the towel in front of him and stood there fully nude. He apologized for upsetting her, told her he would never touch her again and said he had confessed his sins to God and asked God for forgiveness. Rodriguez was arrested later that day.

The prosecution also presented the expert testimony of a clinical psychologist on child abuse. Among other things, he testified about the reasons a child might remain silent in the face of abuse, delay disclosure or only partially disclose or retract an allegation of abuse; a child's sense of helplessness in the face of an abuser in a position of power over a child, particularly when a parent is unavailable to protect the child; and the coercive tactics used by child abuse perpetrators.

B. The Defense Evidence

Rodriguez's defense focused on challenging the credibility of Marie's accounts. Among other things, the defense called Lynn as a witness. She testified that she struggled with drug addiction and mental health issues and had lost custody of several children following allegations of sexual abuse by ex-spouses or relatives. As a teenager,

[2] The jury listened to the recording using a transcript that was not admitted, but which is in the record. We use this transcript here as well.

she falsely accused her father of abuse in order to get away from home. When Marie was 17 months old, Lynn had alleged her husband had molested Marie.

The defense also presented a number of witnesses who testified about Rodriguez's good character, such as a man Rodriguez had worked with for 11 years, Rodriguez's granddaughter, a man with whom Rodriguez lived at the Salvation Army for two years and a woman who had known Rodriguez for several years. None of these witnesses ever saw Rodriguez act inappropriately around any child.

The defense also presented expert testimony by a forensic psychologist. She testified about matters such as flawed interviewing techniques, the susceptibility of children to suggestion and the significance a child's denial and recantation of abuse. The defense used her testimony to challenge the credibility of Marie's allegations.

II.

Verdict, Sentencing, and Appeal

The jury convicted Rodriguez of count III (felony lewd act on a child) and count VI (misdemeanor child molestation). It acquitted him on the remaining counts.

The court sentenced Rodriquez to an eight-year term in state prison for count III and a one-year concurrent term in county jail for count VI, and ordered that he receive 1,558 days of credit for time served.

Rodriguez filed a timely notice of appeal of the court's judgment.

DISCUSSION

I.

The Court's Instructional Error Was Not Prejudicial to Rodriguez's Case.

Rodriguez first contends the trial court erroneously gave conflicting jury instructions that eliminated the People's burden to prove he had the sexual motive required to be convicted of misdemeanor child molestation as alleged in count VI, thereby prejudicially violating his due process rights and requiring reversal of that conviction. The People agree that the court erred, but argue the error was harmless. We agree with the People.

A. The Court Erred in Instructing the Jury Regarding Motivation.

We review the correctness of the court's jury instructions de novo (*People v. Posey* (2004) 32 Cal.4th 193, 218) based on our review of the court's instructions as a whole. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) Although Rodriguez did not contend below that the instructions eliminated the motive element of misdemeanor child molestation, "it is well settled that no objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge." (*People v. Mil* (2012) 53 Cal.4th 400, 409.)

Rodriguez was charged in count VI with sexually molesting a child in violation of section 647.6, subdivision (a)(1), which applies to "[e]very person who annoys or molests any child under 18 years of age." " '[T]he evident purpose of [section 647.6] . . . indicates that the acts forbidden are those *motivated by* an unnatural or abnormal sexual interest or intent with respect to children.' " (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.) Therefore, "[t]o convict a defendant of violating section 647.6, the prosecution must prove the defendant was motivated by an unnatural sexual interest in a particular child or in children generally." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165.) Accordingly, using CALCRIM No. 1122, the trial court instructed the jury:

"The defendant is charged in Count 6 . . . with annoying or molesting a child, in violation of Penal Code Section 647.6. . . . [¶] To prove that the defendant is guilty of this crime, the People must prove, one, the defendant engaged in conduct directed at the child; two, a normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct; three, *the defendant's conduct was motivated by unnatural or abnormal sexual interest in the child*; and, four, the child was under the age of 18 years at the time of the conduct." (Italics added.)

This instruction correctly required the prosecution to prove every element of the crime. However, the trial court, using CALCRIM No. 370, also instructed the jury that "[t]he People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching a verdict, you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show the defendant

is guilty. Not having a motive may be a factor tending to show that the defendant is not guilty."

The court erred by giving the CALCRIM No. 370 instruction because it conflicted with the court's CALCRIM No. 1122 instruction. "Motive is not generally an element of a criminal offense. But when it *is* an element, the trial court errs by giving an unmodified version of CALCRIM No. 370, an optional instruction that tells the jury the prosecutor need not prove the defendant's motive to commit the charged crimes." (*People v. Valenti*, *supra*, 243 Cal.App.4th at p. 1165.) This is because such conflicting instructions "are closely akin" to instructions that remove a mental state element entirely from a jury's consideration. (*People v. Lee* (1987) 43 Cal.3d 666, 674.) They "constitute a denial of federal due process and invoke the *Chapman* [*v. California* (1967) 386 U.S. 18, 24] 'beyond a reasonable doubt' standard for assessing prejudice." (*People v. Maurer*, *supra*, 32 Cal.App.4th at p. 1128.) "This is so even where the court's instructions on the offense itself correctly explain the required intent, because we have 'no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.' " (*Valenti*, at p. 1165, quoting *Francis v. Franklin* (1985) 471 U.S. 307, 322.)

Having determined the court erred, we turn to whether the error is prejudicial.

B. The Instructional Error Was Harmless.

Under *Chapman*, we reverse unless the People "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Given the present circumstances, we " 'conduct a thorough examination of the record. If, at the end of that examination [we] cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[we] should not find the error harmless.' " (*People v. Mil*, *supra*, 53 Cal.4th at p. 417, quoting *Neder v. United States* (1999) 527 U.S. 1, 19.) On the other hand, if Rodriguez's motive was uncontested at trial and supported by evidence such that no rational juror could come to a different conclusion, we should conclude the error was harmless. (*Mil*, at p. 417.) In other words,

we determine not whether a reasonable fact finder could have believed Rodriguez acted with sexual motive, but rather, "whether any rational fact finder could have come to the *opposite* conclusion." (*Id*. at p. 418.)

We conclude beyond a reasonable doubt that regardless of the court's error, no rational juror could have concluded Rodriguez acted without sexual motive in exposing his penis to nine-year-old Marie as she sat on her bed watching television. Rodriguez contends the error was not harmless because the circumstances surrounding the evidence of his exposing himself to Marie lack "clarity and detail," there was evidence that his nudity in Marie's presence generally was the result of carelessness and indifference rather than sexual interest because, as he indicated in the pretext phone call with Marie, he unknowingly exposed himself while she hid in his bedroom closet and under the bathroom sink, and the jury acquitted him of five of seven charges, indicating it "struggled with its assessment of Marie's credibility." None of these contentions are persuasive here. Marie provided sufficient clarity and detail about the incident to support the charge, which Marie described as Rodriguez coming into her bedroom as she sat on her bed watching television, asking her if she wanted to see something and exposing his penis to her. There is no evidence that she hid during this incident and her account indicates Rodriguez could not have exposed himself without knowing she was present. And indeed, he did not contend he exposed himself to her unknowingly at trial, instead asserting that Marie had made up the incidents she testified about because of his role in disciplining her. Finally, regardless of the other acquittals, the jury clearly found Marie credible regarding the count VI incident because it convicted him of that charge.

Rodriguez's own statements in the pretext phone call with Marie further indicate that he had a sexual motive for exposing his penis to Marie in this incident. Rodriguez's responses to Marie's questions implicitly acknowledged that he had exposed himself to Marie. He contended that Marie had generally instigated him to do so, saying at one point, "[T]hat's what you wanted at the time" and "What you did is your actions were talking for yourself kiddo." He gave as an example of her instigation that she once took off a towel that covered her body and stood nude in front of him. He also said he had

confessed his sins to God and asked God for forgiveness. All of these statements strongly suggest he exposed his penis to Marie with a sexual motive in mind.

In short, Rodriguez offered no legitimate explanation for his exposing his penis to Marie in the relevant incident and the evidence points to only one conclusion: that he had a sexual motive for doing so. No rational juror could have concluded otherwise. Any error was harmless.

II.

There Is No Indication the Court Erred in Withholding Sealed School Records.

Before trial, Rodriguez subpoenaed Marie's records from the San Francisco Unified School District. Defense counsel contended there was evidence Marie had had school attendance problems and had used fake notes to absent herself from school. Counsel argued Marie's school records could be relevant to show she falsely accused Rodriguez of sex offenses because she was upset that he tried to compel her to go to school.

The trial court reviewed the confidential records produced by the school district in camera to determine if any should be released regarding Marie's school attendance, use of past notes, or past accusations, if any, of others' sexual abuse or misconduct. It released documents to the parties regarding "all the relevant dates as far as absences" from school and stated that it did not find any records of Marie reporting she had been sexually molested or abused by other people. It ordered the records it had withheld from the parties retained and sealed for appellate review.

Rodriguez requests that we independently review the sealed San Francisco Unified School District records to determine if the trial court abused its discretion.

We "routinely independently examine[] the sealed records of such in-camera hearings to determine whether the trial court abused its discretion in denying a defendant's motion for disclosure . . . ." (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.) We have independently reviewed the designated records filed under seal. The parties and the record do not indicate what was released to the parties beyond the court's statement at the hearing that it was releasing documents regarding "all the relevant dates as far as

absences" from school. Assuming that to be the case, we agree with the court's assessment of the records and find no indication that it abused its discretion.

III.

The Court Prejudicially Erred in Sentencing Rodriguez to an Upper Term for His Lewd Act Conviction.

Finally, Rodriguez argues we must vacate his upper term sentence and remand for resentencing for count III, committing a lewd act on a child under 14 years of age in violation of section 288, subdivision (a), because the court erroneously relied on Marie's youthfulness as an aggravating factor when lewd conduct within the meaning of section 288, subdivision (a) already has an age-range factor for the victim as an element of the offense. Rodriguez characterizes Marie's age as an inappropriate ground for the court's sentencing decision and argues that the court's error was, therefore, of a federal constitutional dimension.

A. The Proceedings Below

The probation department recommended that the trial court sentence Rodriguez to the mid-term of six years for his count III lewd act conviction. The department noted Rodriguez's age (70), poor health, and one circumstance in mitigation—that Rodriguez had no prior criminal record. The department noted two circumstances in aggravation relating to the crime: (1) that Marie was "particularly vulnerable" (Cal. Rules of Court, rule 4.421(a)(3)) given her age and that she was victimized inside her home by a person she considered her grandfather; and (2) that Rodriguez "took advantage of a position of trust or confidence to commit the offense" (*id.*, rule 4.421(a)(11)) because he resided inside Marie's home and was considered a grandfather to Marie.

The prosecution recommended that the trial court sentence Rodriguez to the upper term of eight years for his count III lewd act conviction. The prosecution agreed with the probation department assessment of the one mitigating and two aggravating factors present in the case, and asserted additional aggravating factors that the court should consider. The prosecutor contended that Marie was particularly vulnerable because she

lacked parental supervision and contact with adult family figures, and that Rodriguez took advantage of this situation.

Defense counsel argued Rodriguez should be placed on probation or given a sentence that was no more than the credit for time served to which he was entitled. Counsel argued that there were facts supporting multiple mitigating factors, including Rodriguez's lack of a criminal record, his pro-social nature, his amenability to treatment and the unusual circumstances indicating the crime was unlikely to reoccur. Defense counsel further argued that the court should not consider Marie's age or that Rodriguez had violated a position of trust because "those factors are present in almost all of these types of cases," i.e., convictions for violating section 288, subdivision (a), and are "built into the charge itself."

A letter from Marie was also read into the record. She wrote that Rodriguez's crimes against her had greatly and negatively affected her. She was "inconsistent" in her school attendance, "afraid to be around people," had "major trust issues" and suffered from bad panic attacks. She asked the court to impose "maximum punishment" so that other children would be safe.

At the conclusion of the hearing, the court imposed the upper term of eight years on the count III lewd act conviction. It stated:

"You know, children are the most precious people. We all have children. Children are to be cherished. They are to be nurtured, taken care of, and loved, whether you have sons or daughters, grandchildren, grandsons or granddaughters. These are young people that—not should, but must be loved, protected.

"We remember the days that we raised our child. We go to school with them from preschool. We go attend their plays. We stand in line with them during preschool, elementary school, middle school, high school, college.

"During all that time, we love them; we protect them; we nurture them; we console them. When their hearts are broken, we give them guidance.

"I have taken into consideration everything in this case, and I will tell you that I weighed everything. I weighed Mr. Rodriguez's character, his history, his support from

his family, from his daughter, granddaughter. I weighed into consideration his medical condition. . . . [¶] But the Court cannot forget that a young child nine years of age was put through this nightmare.

"As I said, children are to be nurtured and loved so that later on in life, they will have a full life without any psychological burdens, without any fears of people, people that they should trust, that they should love. The innocence of a young child should never have been taken away by anyone.

"Young children are the most vulnerable in our society along with the senior citizens. Senior citizens are like young people. It's a full circle of life."

After indicating it had extensively reviewed the parties' arguments and given considerable thought to sentencing, the court further stated:

"Marie C. never even had a good childhood to begin with. It didn't seem like the mother cared. She had no one to trust, but she trusted Mr. Rodriguez Jr. And if she trusted Mr. Willie Rodriguez Jr., that trust should have been reciprocal. She should have been protected and nurtured, consoled.

"Having weighed everything, at this time the judgment and sentence of this Court for Mr. Willie Rodriguez is as follows:

"Mr. Willie Rodriguez Jr., you are sentenced to the aggregate of eight years in state prison. . . . [¶] . . . [¶] The reason the Court is rendering sentence is because of the vulnerability of a nine-year-old. I don't think a nine-year-old will know what's right and what's wrong and what's innocent and what's not. It breaks my heart to know that a young child was not protected and was raised in a family that didn't provide any love or care. She trusted Mr. Willie Rodriguez Jr.

"Unfortunately, that trust was misplaced. A nine-year-old would never be able to defend herself regardless of what happened. I think an adult should know better."

B. Analysis

As the trial court's statement at sentencing makes clear, it relied on Marie's status as a child by itself as an aggravating factor. Although the court alluded to potential aggravating factors (vulnerability of the victim and abuse of a position of trust by

Rodriguez), in the context of the court's extended soliloquy on children its passing references to these factors was far too spare for us to conclude the court's error was harmless.

Courts have "broad discretion" to choose the upper, middle, or lower term in sentencing a defendant to a determinate term in state prison but must "specify reasons for its sentencing decision." (*People v. Sandoval* (2007) 41 Cal.4th 825, 846–847.) " '[A] single factor in aggravation is sufficient to justify a sentencing choice.' " (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413.) However, a court abuses its discretion if, among other things, it "relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Sandoval*, at p. 847.)

Rodriguez was convicted of committing a lewd act upon a child under the age of 14 in violation of Penal Code section 288, subdivision (a).[3] Thus, Marie's age was an element of the crime. "A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term." (Cal. Rules of Court, rule 4.420(d); see § 1170, subd. (b) ["the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law"].) Therefore, the trial court could not rely on Marie's age, without more, as a "particular vulnerability" aggravating factor. (See *People v. Quintanilla*, *supra*, 170 Cal.App.4th at p. 413; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694, disapproved on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123; *People v. Ginese* (1981) 121 Cal.App.3d 468, 477.)

Rodriguez argues that the court at sentencing relied on Marie's age by itself in setting his upper term sentence. The record supports his contention. The court began its explanation of its sentencing decision with a peroration on childhood itself, without

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[3] Section 288, subdivision (a) states in relevant part, "a person who willfully and lewdly commits any lewd or lascivious act, . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

reference to any circumstances specific to Marie other than her age. The court's reliance on Marie's age alone as an aggravating factor was error.

As we have discussed, Rodriguez argues we must evaluate any error under the federal *Chapman* standard because "[w]hen state law permits a trial court to consider recognized factors in aggravation and mitigation in making its sentencing choice, the trial court cannot rely on irrelevant criteria in making its sentencing choice; in this context, a state created liberty interest emerges which cannot be arbitrarily deprived without violating the Due Process Clause of the Fourteenth Amendment." He relies for this proposition on *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 and *Vitek v. Jones* (1980) 445 U.S. 480, 488-489. He further asserts that, even if the state standard for error applies here, we should find the court's error prejudicial under *People v. Levitt* (1984) 156 Cal.App.3d 500, 518 (*Levitt*), disapproved in part on another ground in *People v. Johnson* (2016) 62 Cal.4th 600, 659, fn. 6. *Levitt* stated, "absent unusual circumstances, the presence of a mitigating factor renders improper reliance on an aggravating factor prejudicial, since, with the improper factor eliminated, the presence of mitigation might reasonably affect the balance of the court's judgment." (*Levitt*, at p. 518.)

The People assert the state standard for prejudice, i.e., that "reversal is only required where there is a reasonable probability the trial court would sentence the defendant differently absent the erroneous factors. [Citation.] Thus, where the trial court has stated several factors warranting the upper term, and only some of those factors are erroneous, the sentence is generally affirmed." (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319; see also *People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper"].)

We have no need to resolve the debate between the parties about the standard of error we should apply here because whichever standard applies, we conclude the court's error was prejudicial for two reasons.

First, even if the state standard applies here, the error was prejudicial because of the existence of at least one mitigating factor. The court stated in *Levitt* that an erroneous consideration of aggravating factors when mitigating factors are present is *not* prejudicial when "the record indicates a virtual certainty that the erroneous factors did not affect the balance of the trial court's judgment." (*Levitt, supra*, 156 Cal.App.3d at p. 518.) The record does not indicate a virtual certainty here. While the trial court did not make a statement about mitigating factors, it is apparent that at the very least Rodriguez lacked a criminal record, as acknowledged by the probation department.

Second, it is apparent the trial court's primary reason for imposing an upper-term sentence was Marie's age. While a "court could reasonably, and properly, rely on the *combination* of . . . facts," including a victim's age, to find the victim is particularly vulnerable (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 195), the trial court firmly *anchored* its vulnerability analysis in Marie's status as a nine year old—referring to the "vulnerability of a nine-year-old," a nine year old's limited sense or right and wrong, and a nine year old's inability to defend herself—and did so only after extensively discussing that status alone to explain its sentencing decision.

We thus conclude the sentence the court imposed for Rodriguez's lewd act conviction must be vacated and defendant resentenced.

DISPOSITION

The judgment is affirmed, except that Rodriguez's upper-term sentence for committing a lewd act upon a child under the age of 14 in violation of Penal Code section 288, subdivision (a) is vacated and this matter is remanded to the trial court for further sentencing proceedings consistent with this opinion.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

People v. Rodriguez (A154371)